Filed 5/23/19 In re E.W. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re E.W., a Person Coming Under the Juvenile Court Law.	C086663
SACRAMENTO COUNTY DEPARTMENT OF CHILD, FAMILY AND ADULT SERVICES, Plaintiff and Respondent, v. F.W., Defendant and Appellant.	(Super. Ct. No. JD238207)

Appellant F.W., mother of the minor, appeals from dispositional orders entered by the juvenile court adjudging the minor a dependent and removing the minor from her custody. (Welf. & Inst. Code, §§ 358, 360, 395.)[1] She contends the juvenile court

[1] Further undesignated code references are to the Welfare and Institutions Code.

violated the duty of inquiry imposed by the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) We shall affirm.

I. BACKGROUND

On June 20, 2017, Sacramento County Department of Child, Family and Adult Services (the County) filed a section 300 petition on behalf of the then three-month-old minor based on mother's extensive history of substance abuse, her failure to protect the minor's teenage half sibling from sexual exploitation and engaging unsafe behaviors, and causing the death of the minor's infant half sibling while under the influence of methamphetamine.

The detention report indicated that mother had indentified O.S. as the father and stated he had signed a declaration of paternity at the hospital when the minor was born, but she informed the social worker that he was not the biological father of the minor and had simply wanted to help mother. O.S. stated that he was not the minor's biological father but was willing to care for the minor. Both mother and O.S. denied Indian ancestry.

Mother and O.S. appeared at the June 23, 2017, detention hearing. At the hearing, mother identified M.J. as a possible biological father. The juvenile court made emergency detention findings and continued the matter for additional information regarding paternity. At the continued detention hearing on June 28, 2017, the juvenile court set aside the declaration of paternity and ordered a paternity examination of M.J. and O.S. Mother and M.J. also submitted a parental notification of Indian status to the juvenile court. Mother indicated that she did not have any Indian ancestry. M.J. indicated possible Indian ancestry but did not identify a tribe. The juvenile court found there was no reason to know that the minor was an Indian child under the ICWA.

A paternity hearing was held on August 16, 2017. Upon receiving the results of the paternity testing, and a voluntary declaration of paternity signed by O.S., the juvenile court found O.S. to be the biological and presumed father of the minor.

The combined jurisdiction/disposition hearing commenced on September 19, 2017. On September 20, 2017, the juvenile court sustained the allegations in the petition, adjudged the minor a dependent, removed the minor from parental custody, and ordered reunification services for O.S. but bypassed mother. It then continued the disposition hearing to allow for a reunification plan to be created for O.S. The disposition hearing concluded on February 21, 2018. O.S. was provided with a reunification plan and the matter was set for a six month review hearing. Mother appealed.

II. DISCUSSION

The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) If, after the petition is filed, the court "knows or has reason to know" that an Indian child is involved, notice of the pending proceeding and the right to intervene must be sent to the tribe. (25 U.S.C. § 1912; §§ 224.2, 224.3; Cal. Rules of Court, rule 5.481(b).)[2] The court and the agency have "an affirmative and continuing duty to inquire" whether a child is or may be an Indian child. (§ 224.2, subd. (a), former § 224.3, subd. (a); *In re A.B.* (2008) 164 Cal.App.4th 832, 838.) A mere suggestion of Indian ancestry is sufficient to trigger the notice requirement. (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989.) Failure to comply with the inquiry and notice provisions and determine whether ICWA applies is prejudicial error. (*In re Kahlen W.* (1991) 233 Cal.App.3d. 1414, 1424; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.)

Mother challenges the juvenile court's orders finding the ICWA does not apply. She argues that since O.S. was found to be the biological and presumed father, the juvenile court erroneously failed to inquire of him whether he had Indian ancestry. We

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[2] Further undesignated rule references are to the California Rules of Court.

agree that the juvenile court should have so inquired, but find the error harmless in this case.

A. "Interim" Order

The dispositional order is the judgment and is unquestionably an appealable order. (§ 395; *In re M.C.* (2011) 199 Cal.App.4th 784, 801.) In fact, it is generally the first reviewable order in a dependency case and earlier orders are generally reviewable on appeal from the dispositional order. (*In re M.C., supra,* at p. 801.) Nonetheless, the County argues that, because the juvenile court has a continuing duty to comply with the ICWA, the juvenile court's failure to comply with the ICWA inquiry requirement and its finding that the ICWA is inapplicable is "akin" to an interim order and is, therefore, not appealable. We reject the County's argument that the instant appeal should be dismissed as taken from a nonreviewable interim order. Here, the appeal was appropriately taken from the judgment.

It is well-established that "[j]uvenile dependency law does not abide by the normal prohibition against interlocutory appeals [citation]. . . . [A]ll postdispositional orders in juvenile dependency matters are directly appealable without limitation, except for post-1994 orders setting a section 366.26 hearing. (§ 395, § 366.26, subd. (l).)" (*In re Edward H.* (1996) 43 Cal.App.4th 584, 590; see also *In re S.B.* (2009) 46 Cal.4th 529, 532.) Thus, while this appeal was taken from the judgment, appeal from even an interim order is the proper means by which to challenge the juvenile court's failure to comply with the ICWA notice and inquiry requirements at that hearing. (See *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339-340.)

B. Ripeness and Standing

The County concedes, and it is well-established, that a non-Indian parent has standing to assert an ICWA notice violation on appeal. (*In re Jonathon S., supra*, 129 Cal.App.4th at p. 339.) Nonetheless, the County argues that the case is not ripe for

appeal, and mother does not have standing because mother did not first bring a petition for invalidation in the juvenile court.

The County points to the provision in the federal regulations, and the corresponding state law and rule, providing for the filing of a petition for invalidation of prior orders entered in violation of the ICWA. These statutes provide that an Indian child, parent, Indian custodian, or the Indian child's tribe, may petition a court of competent jurisdiction to invalidate any action taken in a child custody matter that violates any provision of Title 25 United States Code section 1911. (25 U.S.C. § 1914; 25 C.F.R. § 23.137; § 224, subd. (e); rule 5.486(a).) The County argues that because this specific remedy for ICWA violations exists, appeal is an improper remedy. It argues that a petition for invalidation is the *exclusive* remedy available for ICWA notice and inquiry violations, and mother was required to unsuccessfully pursue such a petition in the juvenile court prior to seeking relief on appeal.

Despite arguing that a petition for invalidation is the exclusive remedy for an ICWA violation, the County also argues mother does not have *standing* to file such a petition for invalidation. It argues the petition is only available to parents of Indian children—not parents of a *potential* Indian child for whom ICWA inquiry and notice was not effectuated. We decline to read the statutory authority cited by the County as precluding a parent of a potential Indian child from challenging the adequacy of ICWA inquiry and notice by appeal. (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 636 [applying the maxim of jurisprudence that " '[for] every wrong there is a remedy' "].) Such a construction would preclude review of almost any case in which the juvenile court or agency failed to inquire about Indian ancestry, or failed to send ICWA notice to pertinent tribes, circumventing the purpose of providing notice to tribes under the ICWA. No one would have standing to challenge the ICWA inquiry and/or notice violations until the child was found to be an Indian child—yet, the relevant tribes and individuals would not have been given the opportunity to find a child to be a tribal member *because* of the

inquiry and/or notice deficiency. We do not construe statutes in ways leading to absurd consequences or defeating the general purpose and policy behind them. (*Anaheim Union Water Co. v. Franchise Tax Bd.* (1972) 26 Cal.App.3d 95, 105-106.) Appeal has traditionally been found to be the appropriate vehicle by which to raise an ICWA notice or inquiry violation, and it is appropriate here.

C. Inadequate Inquiry

Having determined that the issue of whether adequate inquiry was made under the ICWA is properly before this court in this appeal, we now address the merits of mother's contention.

The juvenile court found the ICWA did not apply at the June 28, 2017, detention hearing—prior to O.S. being found to be a presumed parent. It does not appear on the record that the juvenile court inquired about O.S.'s possible Indian ancestry either before or after he was found to be a presumed parent.

As we have set forth, the juvenile court has an ongoing duty to inquire about the minor's Indian ancestry. (*In re A.B., supra*, 164 Cal.App.4th at pp. 838-839) "If the court fails to ask a parent about his or her Indian heritage, a limited reversal of an order or judgment and remand for proper inquiry and any required notice *may* be necessary. [Citation.] Reversal is *not* warranted, however, when the court's noncompliance with the inquiry requirement constitutes harmless error. [Citations.]" (*Id.* at p. 839, italics added.)

The failure of the juvenile court to inquire of O.S. whether he has Indian ancestry was error, but the error was harmless in this case. As acknowledged by mother, the record reflects that O.S. informed the Department prior to the detention hearing that he does *not* have Indian ancestry. This information was contained in the detention report. There is no reason to believe an additional inquiry by the court would result in a different response. Thus, the juvenile court's failure to separately inquire about O.S.'s Indian ancestry does not constitute reversible error.

III. DISPOSITION

The orders of the juvenile court are affirmed.

/S/

RENNER, J.

We concur:

/S/

MAURO, Acting P. J.

/S/

DUARTE, J.